SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 492

CLARENCE BRANDENBURG, *Appellant,*

—v.—

STATE OF OHIO, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLANT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Statutes Involved 2

Questions Presented 3

Statement of the Case 4

ARGUMENT

I. Ohio Revised Code Para. 2923.13 is unconstitutional on its face and as authoritatively construed because it imposes criminal sanctions on the exercise of the rights of expression and assembly protected by the First and Fourteenth Amendments 9

II. Paragraph 2923.13 is invalid under the First and Fourteenth Amendments because of its vagueness and overbreadth 15

III. Paragraph 2923.13 is unconstitutional as applied, because it punishes speech protected by the First and Fourteenth Amendments 21

IV. Paragraph 2123.13, which indiscriminately prohibits criminal syndicalism directed against the United States and the State of Ohio, is preempted by federal legislation 27

V. Appellant was denied the due process of law in that his conviction was supported by no evidence whatever 30

CONCLUSION 33

Table of Authorities

PAGE

Cases:

Abrams v. U. S., 250 U. S. 616 (1919) 21, 23
American Communications Association v. Douds, 338 U. S. 382 (1950) 21, 22, 24
Aptheker v. Sec. of State, 378 U. S. 500 (1964) 14

Baggett v. Bullitt, 377 U. S. 360 (1964) 16, 19
Barr v. City of Columbia, 378 U. S. 146 (1964) 30
Baser v. Binder, —— F. Supp. —— (W. D. Ky. Civ. Action No. 5648, decided Oct. 13, 1967) 11
Bond v. Floyd, 385 U. S. 116 (1966) 12, 13
Brotherhood of Carpenters v. U. S., 330 U. S. 395 27

Cantwell v. Connecticut, 310 U. S. 296 (1940) 15, 20, 21
Cox v. Louisiana, 379 U. S. 536 (1965) 14, 25
Cramp v. Board of Public Instructors, 368 U. S. 278 (1961) 10, 16, 19

DeGregory v. New Hampshire Attorney General, 383 U. S. 825 (1966) 27
DeJonge v. Oregon, 299 U. S. 353 (1937) 31, 32
Dennis v. United States, 341 U. S. 494 (1950) 21, 22, 23, 24, 25
Dombrowski v. Pfister, 380 U. S. 479 (1965) 13, 15, 16, 17, 20

Edwards v. South Carolina, 372 U. S. 229 (1963) 25
Elfbrandt v. Russell, 384 U. S. 111 (1966) 14, 16, 19, 20

Feiner v. New York, 340 U. S. 316 (1950) 25
Fiske v. Kansas, 274 U. S. 380 (1927) 31

PAGE

Garner v. Louisiana, 368 U. S. 157 (1961) 30
Gitlow v. New York, 268 U. S. 652 (1925) 11, 21, 25

Hague v. C. I. O., 307 U. S. 496 (1939) 14
Harris v. Younger, 281 F. Supp. 507 (C. D. Calif., 1968) 11
Hebert v. Louisiana, 272 U. S. 312 10
Herndon v. Lowry, 301 U. S. 242 (1937) 12

Johnson v. Florida, 391 U. S. 596 (1968) 30

Keyishian v. Bd. of Regents, 385 U. S. 589 (1967) 14, 16, 17, 18, 19, 20
Kingsley Pictures Corp. v. Regents, 360 U. S. 684 (1959) 10, 23

Luther v. Borden, 7 How. (48 U. S.) 1 (1849) 30

Marsh v. Alabama, 326 U. S. 501 (1946) 13

NAACP v. Button, 371 U. S. 415 (1963) 15, 20
New York Times v. Sullivan, 376 U. S. 254 (1964) 15
Noto v. United States, 367 U. S. 290 (1963) 12

Pennsylvania v. Nelson, 350 U. S. 497 (1950) 27, 29, 30

Schenck v. United States, 249 U. S. 47 (1919) 21
Schneiderman v. United States, 320 U. S. 118 (1943) .. 14
Silber v. United States, 370 U. S. 717 (1962) 27
Smith v. California, 361 U. S. 147 (1959) 20
State v. Kassey, 126 O. S. 177 (1932) 11
Stromberg v. California, 283 U. S. 359 (1931) 13

PAGE

Terminiello v. Chicago, 337 U. S. 1 (1949) 10, 13, 27
Thompson v. Louisville, 362 U. S. 199 (1960) 30

United States v. Cruikshank, 92 U. S. 542 (1875) 15
United States v. Robel, 389 U. S. 258 (1967) 12, 14, 21
Uphaus v. Wyman, 360 U. S. 72 (1959) 27, 29

Ware v. Nichols, 266 F. Supp. 564 (N. D. Miss., 1967) 11
Whitehall v. Elkins, 389 U. S. 54 (1967) 16
Whitney v. California, 274 U. S. 357 (1927) 21, 22
Winters v. New York, 333 U. S. 507 (1948) 10, 15
Wood v. Georgia, 370 U. S. 375 (1962) 21

Yates v. United States, 354 U. S. 298 (1957) 12

Zwickler v. Koota, 389 U. S. 241 (1968) 20

Constitutional Provisions:

United States Constitution

First Amendment ..... *passim*

Fourteenth Amendment 3, 8, 9, 12, 15, 21, 26

Statutes:

10 U. S. C. §2385 27

50 U. S. C. §781 et seq. 27

50 U. S. C. §841 27

New York Civil Service Law:

Section 105 16

Section 105(1)(a) 17, 18

PAGE

New York Education Law:

Section 3021 16

New York Penal Law:

Sections 160-61 ..... 16, 18

Ohio Revised Code:

¶2923.12 ..... 3, 9, 10

¶2923.13 ..... *passim*

¶2923.14-.15 10

Other Authorities:

Emerson, Haber, and Dorsen, 1 Political and Civil Rights in the United States, 126 (3d ed. 1967) 22

Nathanson, The Communist Trial and the Clear-and-Present Danger Test, 63 Harv. L. Rev. 1167 (1950) 22

Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193 (1952) 22

IN THE

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No. 492

CLARENCE BRANDENBURG,

Appellant,

—v.—

PEOPLE OF THE STATE OF OHIO,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR APPELLANT

Opinions Below

There are no written opinions, either reported or unreported, in this case. The Judge assigned to write the opinion for the Ohio Court of Appeals died before completing it, and the Ohio Supreme Court issued no opinion.

Jurisdiction

This appeal is from the final judgment of the Supreme Court of the State of Ohio entered on June 12, 1968, dismissing *sua sponte* the appeal from the Court of Appeals of the First Appellate District of Ohio, dated February 16, 1968, affirming the judgment of conviction rendered in the Court of Common Pleas, Hamilton County, Ohio on

December 5, 1966. Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Ohio on June 25, 1968. The Jurisdictional Statement was filed on September 9, 1968 and probable jurisdiction was noted on November 18, 1968. Appellants sought and were granted an enlargement of time until January 7, 1969 to file this brief. Jurisdiction on appeal is conferred by 28 U. S. C. §1257(2).

Statutes Involved

Ohio Revised Code ¶2923.13. *Advocating criminal syndicalism.*

> No person shall by word of mouth or writing advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform; or print, publish, edit, issue, or knowingly circulate, sell, distribute, or publicly display any book, paper, document, or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence, or unlawful methods of terrorism; or openly, willfully, and deliberately justify, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence, or unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or organize or help to organize or become a member of, or voluntarily assemble with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.

Ohio Revised Code ¶2923.12. *Criminal Syndicalism.*

As used in Sections 2923.13 to 2923.15 inclusive of the Revised Code, "criminal syndicalism" is the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform.

Questions Presented

1. Whether Ohio Revised Code ¶2923.13, which prohibits advocacy of criminal syndicalism, violates the First and Fourteenth Amendments on its face.

2. Whether Ohio Revised Code ¶2923.13, which prohibits advocacy of criminal anarchy, violates the First and Fourteenth Amendments as construed and applied in this case.

3. Whether Ohio Revised Code ¶2923.13, which prohibits criminal syndicalism directed against the United States and the State of Ohio is preempted by Federal legislation.

4. Whether there was any evidence to sustain a conviction under ¶2923.13 of the Ohio Revised Code, as required by the due process clause of the Fourteenth Amendment.

Statement of the Case

Appellant was indicted and convicted in the Court of Common Pleas, Hamilton County, Ohio for advocating "the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform," and, on a second count, for voluntarily assembling "with a group or assemblage of persons formed to advocate the doctrines of criminal syndalism," both violations of ¶2923.13 of the Ohio Revised Code. For these crimes of advocacy and assembly, appellant was sentenced to a prison term of from one to ten years and fined $1,000.

The events upon which the conviction was based were depicted at trial in two films that were offered into evidence by the state (A. 17, 24). The announcer-reporter who helped make the film testified that he had received a telephone invitation from an unknown party to appear at a rally, identified to him as a Ku Klux Klan meeting to be held on private property (A. 8, 12). He testified that on June 28, 1964 he helped make a sound film of portions of the meeting for showing on television with the consent and cooperation of the persons participating (A. 12).

The film produced at trial showed that no crowd was gathered or onlookers present besides those participating in the meeting. Nor was any disturbance or call for violence, abstract or otherwise, evident from the film or transcript.

One scene showed ten to twenty hooded figures, some of whom carried long arms, gathered outdoors around a large wooden cross wrapped in rags. During the film the cross

was lit[1] and voices in the crowd unidentified either in the film or elsewhere in the record, offered a series of incomplete phrases and political slogans, some derogatory of Negroes and in one instance of Jews (A. 17, 18):

"I would like to"
"How far is the nigger going to—yeah"
"Over there"
"This is what we are going to do to the niggers"
"I would like to ask—call this—Patrick"
"A dirty nigger"
"Send the Jews back to Israel"
"I'm for it"
"Let's give them back to the dark garden"
"Save America"
"Let's go back to constitutional betterment"
"Bury the niggers"
"We intend to do our part"
"Give us our state rights"

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[1] William Morris, a long-time Klansman, who has written about the organization, was deposed about the meaning of the burning cross:

"It has a spiritual meaning to all Klan members, in the language of the ritualism, symbolism . . . . Now, we are reminded that the cross upon which our Saviour died, which is the criterion of character of every Klansman, prior to the crucification of Christ. The cross was an emblem of degradation and shame, and we are reminded that were it not for the shed [sic] of blood of Jesus Christ on that cross, our own lives would be full of degradation and shame. Now, the fiery cross has a tremendous spiritual significance to us, also, because we are reminded that Jesus Christ said, 'I am the Light of the World.' He also said, and then we are reminded that God placed the flaming sword, guarded the entrance to the Garden of Eden with a flaming sword and he guided the Children of Israel on their journey to the Promised Land by pillar of fire by night and pillar of cloud by day. So, when we add fire to the cross, we simply are proclaiming to the world our fiery zeal. Fire is the greatest purifier yet known to man. So, we symbolically stand before the world in that manner" (A. 68, 69).

"Freedom for the whites"

"Nigger will have to fight for every inch he gets from now on"

Another scene in the same film depicted a man in a red hood, who announced in a calm and ordinary voice that this meeting was an organization meeting and that a march on Congress was planned:

"This is an organizers meeting. We have had quite a few members here today which are—we have hundred, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our president, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.

"We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups—one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you" (A. 17, 18).

The second film taken indoors showed six hooded figures, some of them armed, and an unarmed figure in a red hood behind a table on which had been placed a Bible. He made virtually the same announcement, though somewhat shorter, as that made in the prior scene, omitting any reference to "revengeance" (sic) (A. 24). He added: "I can quote—personally, I believe the nigger should be returned to Africa, the Jew returned to Israel. Thank you" (A. 24).

The prosecution presented no other evidence except the various objects appearing in the film (A. 51), testimony intended to identify appellant as the hooded figure who made the two individual statements (A. 43, R. 97, R. 107),[2] and testimony as to the location at which the meeting was held (A. 9). The prosecution presented no evidence of the nature of the Ku Klux Klan, of the presence of a clear and present danger or of any danger whatsoever surrounding the meeting. The state rested on the words and peaceful activities depicted in the film.

Although the defense did not introduce testimony, appellant submitted depositions and other written evidence from Klan officials (R. 134 *et seq.*) as to the fraternal nature of the Klan and its organizational prohibition against violence. In his deposition, James R. Venable, an attorney and Imperial Wizard (President) of the National Knights of the Ku Klux Klan Association of America reported:

> "We do not tolerate [violence]. That is, when I say that, the Imperial officers or officers in the States, even in the Klaverns, violence gets all of us in trouble, and if we want to accomplish anything, we can't afford to violate the law. I have told all of our Klan groups as well as those belonging to the National Association [for the Advancement of White People] that we couldn't use any type of violence, we had to obey the laws, whether it was good or bad, if we could unify, use the ballot box, we could accomplish this race war as you might call it" (A. 63, 64).

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[2] R. refers to the original record on file with the Clerk of Court. A. refers to the printed Appendix.

For other testimony on the philosophy of the Klan and its organizational restriction against violence, see A. 67, R. 137.

The Court in charging the jury indicated that mere advocacy and assembly were sufficient to constitute violations of the statutes (A. 76-79). The Court's charge did not refer to clear and present danger or to any other First Amendment standard. Nor was there an instruction that the jury need find the aims and purpose of appellant's meeting or of the Klan. The Court charged *sua sponte* as to conspiracy on the assemblage count but did not offer a delimiting instruction on conspiracy in the area of First Amendment rights (A. 79-80). The appellant was convicted on both counts.

The constitutional questions were first raised by appellant's motion to quash the indictment and the memorandum in support thereof on the ground that the statute was unconstitutional on its face and as applied because it violated the First and Fourteenth Amendments (A. 3). The motion was overruled on February 24, 1965 without opinion (A. 4). After some delay, the case proceeded to trial in November 1966. After trial appellant renewed the First Amendment questions and raised the objection that the verdict was against the evidence (A. 5).

On appeal to the Court of Appeals of the First Appellate District of Ohio, appellant pressed the constitutional issues but the Court affirmed without opinion.

On appeal to the Ohio Supreme Court, appellant again raised the constitutional questions asserted below. The Ohio Supreme Court *sua sponte* dismissed the appeal for failure to raise a substantial question but issued no opinion.

ARGUMENT

I.

Ohio Revised Code Para. 2923.13 is unconstitutional on its face and as authoritatively construed because it imposes criminal sanctions on the exercise of the rights of expression and assembly protected by the First and Fourteenth Amendments.

Appellant was indicted for violating two portions of ¶2923.13: the clause that prohibits the use of "crime, sabotage, violence, or unlawful methods of terrorism" to achieve "political reform;" and the clause that makes it a crime to "voluntarily assemble with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

The only definition contained in the Ohio Code is of "Criminal Syndicalism" in ¶2923.12, which states that it is "the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform."

Moreover, none of the three Ohio courts which considered this case rendered an opinion. The Ohio Supreme Court, *sua sponte,* dismissed appellant's appeal for lack of a substantial question. By letting appellant's conviction stand, the Supreme Court of Ohio thus adopted the construction of ¶2923.13 that was contained in the trial court's charge to the jury. This charge broadly defined the operative terms in the statute and the indictment:[3]

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[3] The indictment follows the statutory language closely. It charged that appellant (1) "did unlawfully by word of mouth,

"To advocate means to speak in favor of, defend by argument, to support, vindicate, or recommend publicly . . . "

"Political reform . . . refers to remodeling or changing the policy or the administration of government" (A. 77-78).

Concerning assembly, the jury was instructed that "you must find beyond a reasonable doubt . . . [that] the defendant did unlawfully, voluntarily, assemble with a group or assemblage of persons formed to advocate criminal syndicalism"[4] (A. 79).

As so adopted, the instructions of the trial court are to be read as if their precise words had been written into the statute, *Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949); *Cramp* v. *Board of Public Instructors,* 368 U. S. 278, 285 (1961); *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 688 (1959); *Hebert* v. *Louisiana,* 272 U. S. 312, 317 (1926); *Winters* v. *New York,* 333 U. S. 507, 514 (1948). The instructions are the final and authoritative construction of

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advocate the necessity or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform" and (2) "did unlawfully, voluntarily, assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism."

The instruction nowhere indicated that the term "unlawfully" before "assembly" in the indictment had an operative meaning, as for instance, creating a distinction between "lawful" and "unlawful" assembly. The term was in fact redundant because ¶2923.13 does not use the term "unlawfully" in describing the prohibited assembly.

[4] "As used in paragraphs 2923.13 to 2923.15 inclusive, of the Revised Code, 'criminal syndicalism' is the doctrine which advocates crime, sabotage, which is defined as the malicious injury or destruction of the propriety of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform." Ohio Revised Code ¶2923.12.

§2923.13 by the State of Ohio and are of course binding on this Court.[5]

Aside from the instructions of the trial court in this case, the Criminal Syndicalism Act has been considered in only one previous case, *State* v. *Kassey,* 126 O. S. 177 (1932). There the Ohio Supreme Court explicitly rejected the applicability of the Federal Constitution, 126 O. S. at 184, notwithstanding the earlier decision in *Gitlow* v. *New York,* 268 U. S. 652 (1925). Reading the Ohio Criminal Syndicalism Act solely in the light of the Ohio Bill of Rights,[6] the court found the statute constitutional. Nevertheless the court conceded the broad scope of the Act, finding that it prohibited advocacy and teaching of the "propriety of violence and terrorism as a means of compelling others to agree with one's sentiments." 126 O. S. at 185-86. Under this interpretation the court had no doubt that "those who promoted the Declaration of Independence could have been punished under such a statute as we have under consideration . . ." *Id.* at 190.

While Ohio has a legitimate interest in the prohibition of sabotage, violence, or unlawful methods of terrorism,

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[5] It is interesting to note that in the several cases where similar state criminal syndicalism or related statutes were challenged in federal court, the states urged abstention so that their courts could construe their statutes. See e.g., *Ware* v. *Nichols,* 266 F. Supp. 564 (N. D. Miss., 1967); *Harris* v. *Younger,* 281 F. Supp. 507 (C. D. Calif., 1968); *Baser* v. *Binder,* —— F. Supp. —— (W. D. Ky. Civ. Action No. 5648, decided Oct. 13, 1967). In the present case, Ohio, without any federal interference, had an excellent opportunity to construe narrowly and perhaps constitutionally her broad criminal syndicalism Act. Instead, Ohio chose to affirm the conviction without benefit of explanation or written opinion.

[6] The court acknowledged that the free speech scope of the First Amendment of the Federal Constitution was broader than the comparable section of the Ohio Bill of Rights. 126 O. S. 177, 184, 187 (1932).

it may not promote these interests in a manner that does violence to the First and Fourteenth Amendments. See *United States* v. *Robel,* 389 U. S. 258, 268 n. 20 (1967). Here Ohio has not fulfilled its constitutional responsibility. Both the literal wording of the Ohio Criminal Syndicalism Act and the construction of these words by the trial court prohibit mere advocacy, and both fail to draw the necessary constitutional distinction between "advocacy of abstract doctrine and advocacy directed at promoting unlawful action." *Yates* v. *United States,* 354 U. S. 298, 318 (1957).

This distinction is fundamental. In numerous cases this Court has held that a prohibition that is so vaguely worded as to include both types of advocacy is invalid under the First Amendment. E.g., *Herndon* v. *Lowry,* 301 U. S. 242 (1937); *Yates* v. *United States,* 354 U. S. 298 (1957); *Noto* v. *United States,* 367 U. S. 290 (1961). As this Court said in the *Noto* case, "the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Noto* v. *United States, supra,* 367 U. S. at 297-298. A more immediate precedent is *Bond* v. *Floyd,* 385 U. S. 116 (1966), where the Court upheld the right of a Georgia legislator-elect to express his "sympathy and support" for the young men "who are unwilling to respond to a meritless draft." The Chief Justice, writing for a unanimous Court, said that the statement

> ". . . does not demonstrate any incitement to violation of law. No useful purpose would be served by discussing the many decisions of this Court which establish that Bond could not have been convicted for these statements consistently with the First Amendment. See,

e.g., Wood v. Georgia, 370 U. S. (1962); Yates v. United States, 354 U. S. 298 (1957); Terminiello v. Chicago, 337 U. S. 1 (1949)." 385 U. S. at 134.

There is no need to recount at length the important policies that underlie the distinction between abstract advocacy and advocacy directly promoting unlawful action. Suffice it to say that the First Amendment was designed to permit the broadest interchange of ideas, including ideas that are odious because ". . . the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men.'" *Marsh* v. *Alabama,* 326 U. S. 501, 509 (1946). The special interest in free discussion in a democracy has long been recognized by this Court as fundamental to our system of government because "[t]he right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949). Free expression is "of transcendent value to all society, and not merely to those exercising their rights." *Dombrowski* v. *Pfister,* 380 U. S. 479, 486 (1965). The government's interest in free discussion is not only based on tested principles, but it is a practical necessity in governing a democratic society since "it is only through debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." *Terminiello* v. *Chicago, supra,* 337 U. S. at 4.

The above analysis is applicable to the first clause of ¶2923.13 under which appellant was indicted. The other clause of the statute is also invalid because it prohibits all forms of voluntary assembly with "persons formed to teach or advocate the doctrine of criminal syndicalism." The trial court determined that the words spoke for themselves

and it gave no aid to the jury in applying the terms "unlawful voluntary assembly" (A. 78-79).

Assembly is specifically included within the protection of the First Amendment, and peaceful assembly has long been recognized as a protected right. See, e.g., *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); *Cox* v. *Louisiana*, 379 U. S. 536 (1965). In a long line of cases dealing with attempted prohibitions of or punishments for membership in disfavored organizations, this Court has recognized that "[a] law which applies to membership without 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms." *Elfbrandt* v. *Russell*, 384 U. S. 11, 19 (1966). See also *Keyishian* v. *Bd. of Regents*, 385 U. S. 589, 607-08 (1967). Lack of a requirement of specific intent was fatal in *Aptheker* v. *Sec. of State*, 378 U. S. 500 (1964) and *United States* v. *Robel*, 389 U. S. 258 (1967). Just as "guilt by association," *Schneiderman* v. *United States*, 320 U. S. 118, 136 (1943), has no place in the area of regulation of membership in organizations, some of whose aims are criminal, neither does it have any legitimate place in the area of assembly with such groups.

Indeed, assembly deserves greater protection than membership because the latter may imply agreement with some of the aims or objectives of an organization, while assembly carries with it no such implication. One may assemble for many reasons, such as to learn of the aims and doctrines of a group, without espousing those aims.

The statutory prohibition of free assembly reaches to the core of our democratic system. As this Court said in an early case, "The very idea of a government republican in form, implies a right on the part of its citizens to meet

peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States* v. *Cruikshank,* 92 U. S. 542, 552 (1875).

Ohio has chosen to draw its Criminal Syndicalism Act in broad and sweeping terms and the Ohio Supreme Court has affirmed instructions that construe the statute as all-encompassing in its destruction of the rights of speech and assembly, disregarding not only the requirement of narrow and strict draftsmanship in this sensitive area, see *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Winters* v. *New York,* 333 U. S. 507 (1948); *NAACP* v. *Button,* 371 U. S. 415, 433 (1963); *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), but also the central meaning of the First Amendment, "that the censorial power is in the people over the Government, and not in the Government over the people." *New York Times* v. *Sullivan,* 376 U. S. 254, 275 (1964).

II.

Paragraph 2923.13 is invalid under the First and Fourteenth Amendments because of its vagueness and overbreadth.

In addition to its prohibition against abstract advocacy and innocent assembly, ¶2923.13 is also vague and overbroad both in its provisions against speech and in its other provisions. Indeed, ¶2923.13 is the archetype of the vague statute indiscriminately intruding in the First Amendment area and relying on an area of legitimate concern to a state —the prohibition of violence, sabotage and terrorism—to justify suppression of speech, press and assembly.

The Ohio Criminal Syndicalism Act is an attempt to broadly proscribe activities explicitly protected by the First

Amendment—speaking, writing, printing, assembling. The terms in which ¶2923.13 seeks to regulate this behavior are strikingly similar to those of many loyalty oaths which this Court has struck down because they have been so vague as to proscribe "guiltless knowing behavior", *Cramp* v. *Board of Public Instruction, supra,* 368 U. S. at 286. See also *Baggett* v. *Bullitt,* 377 U. S. 360 (1964); *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Whitehall* v. *Elkins,* 389 U. S. 54 (1967).

Particularly pertinent is *Keyishian* v. *Bd. of Regents, supra,* where this Court examined a statutory scheme ostensibly designed to protect New York's educational system from subversion. That scheme prohibited persons found to have engaged in certain activities from teaching. This Court ruled that the statutes setting out the prohibited activities were so vague as to be invalid under the First Amendment.

Mr. Justice Brennan's discussion of the statutes in *Keyishian* is particularly relevant to the consideration of ¶2923.13 because the terminology in section 3021 of the New York Education Law, section 105 of the New York Civil Service Law, and sections 160-61 of the old New York Penal Law closely parallel the Ohio Code under attack here.

The Ohio Syndicalism Act, unlike the statutory scheme in *Keyishian* and the other oath cases, is a criminal statute. But in *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), it was plainly pointed out that this difference is not of constitutional dimension. "Where, as here, protected freedoms of expression and association are similarly involved, we see no controlling distinction in the fact that the definition

is used to provide a standard of criminality rather than the contents of a test oath." 380 U. S. at 494.

The Court could have added, of course, that a criminal statute, such as the one involved in this case, casts a deeper pall on First Amendment rights because the imprisonment and fine flowing from a conviction represents a certain and severe sanction that is sometimes lacking in oath cases. Consequently, the effect and constitutional infirmity of ¶2923.13 is at least as great as the parallel provisions of the New York law already invalidated in the *Keyishian* case. A clause by clause analysis of the two statutes makes this clear.

One of the clauses that formed the basis of the indictment in this case makes it a crime to "voluntarily assemble with any society . . . to teach or advocate the doctrines of criminal syndicalism." In holding that portion of the New York Civil Service Law §105(1)(a) invalid which barred the appointment of anyone who "wilfully and deliberately advocates" violent overthrow, the Supreme Court said:

> "This provision is plainly susceptible of sweeping and improper application. It may well prohibit the employment of one who merely advocates the doctrine in the abstract without an attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims . . . And in prohibiting 'advising' the 'doctrine' of unlawful overthrow does the statute prohibit mere 'advising' of the existence of the doctrine or advising another to support the doctrine? Since 'advocacy' . . . is separately prohibited, need the person 'teaching' or 'advising' this doctrine himself 'advocate it'? Does the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition?" 385 U. S. at 599-600.

The very same may be said of ¶2923.13.

Another clause of ¶2923.13 reads in part: "No person shall . . . publicly display any book . . . containing or advocating [criminal syndicalism]." Of a similar provision in section 161 of the old New York Penal Law, Mr. Justice Brennan asked, "Does the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy?" 385 U. S. at 599.

The same question may be asked about ¶2923.13.

¶2923.13 also decrees that "No person shall . . . print, publish, edit, issue, or knowingly circulate, sell, distribute, or publicly display any book, paper, document, or written matter in any form, containing or advocating, advising, or teaching . . . [criminal syndicalism]." Mr. Justice Brennan asked of a similarly worded subsection of the New York Civil Service Law,[7] "Does the prohibition of distribution of matter 'containing' the doctrine bar histories of the evolution of Marxist doctrine or tracing the background of the French, American, or Russian revolution?" 385 U. S. at 600-01.

The Ohio Criminal Syndicalism law is equally subject to the charge of undue vagueness and overbreadth.

A fourth clause of ¶2923.13, and one of the two which formed the basis of the indictment here, provides that "No person shall by word of mouth or writing advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of

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[7] N. Y. C. S. L. §105(1)(a): "No person shall be appointed . . . who prints, publishes, edits, issues or sells any book, paper, document, or written or printed matter in any form containing or advocating, advising, or teaching . . . [violent overthrow]."

accomplishing industrial or political reform. . . ." What does it mean to say that there is a "duty, necessity and propriety" to engage in certain conduct? What kind of a "duty"? A "propriety" according to what norms? The undefined statutory language, not supplemented by any guidance from the Ohio courts, is surely an insufficient guide to citizens of that state.

These flaws so strongly condemned by this Court in *Keyishian* were also fatal in earlier loyalty oath cases. In *Cramp* v. *Bd. of Public Instruction, supra,* this Court invalidated a requirement that teachers and other state employees swear that they never lent their "aid, support, advise, counsel or influence to the Communist Party" because it was lacking in "terms susceptible of objective measurement." 368 U. S. at 286. In *Baggett* v. *Bullitt, supra,* this Court struck down loyalty oaths required by the state of Washington of its employees because the oaths were likewise susceptible of such a broad reading as to leave conscientious persons in doubt of what in fact was proscribed. And in *Elfbrandt* v. *Russell, supra,* an Arizona statute requiring a loyalty oath of state employees was held unconstitutional. The statutes in *Baggett* and *Cramp* were unconstitutionally vague because the oaths in question could be read as proscribing such innocent behavior as giving legal advice to the Communist Party. In *Elfbrandt* the oath proscribed innocent conduct, such as membership in an organization with an unlawful purpose without subscribing to that purpose.

The Ohio Criminal Syndicalism Act contains the same fatal defects. Besides those portions of ¶2923.13 that parallel comparable portions of the statute found void-for-vagueness in *Keyishian,* the Act prohibits membership in any group formed to teach or advocate the doctrine of

criminal syndicalism, without any indication as to the quality or purpose of that membership. The Act also prohibits anyone from voluntarily assembling with any group or assemblage of persons formed to teach or advocate the doctrine of criminal syndicalism. If these words do not flatly prohibit mere disinterested assembly to hear others expound their views, or even interested assembly with a desire to learn about certain doctrines, they certainly are so vague that one cannot know whether he endangers his personal freedom when he engages in such activities or indeed stops to listen to a street-corner speaker or watches a parade of dissidents pass by.

For the above reasons ¶2923.13 infringes the constitutional requirement that "the power to regulate must be so exercised as not . . . unduly to infringe the protected freedoms." *Cantwell* v. *Connecticut,* 310 U. S. 296, 304 (1940). This requirement has been reiterated by the Court on numerous occasions, along with the recognition that in the area of free expression it is especially necessary that statutory restrictions be narrowly and precisely drawn because "a man may the less be required to act at his peril here, because free dissemination of his ideas may be the loser." *Smith* v. *California,* 361 U. S. 147, 151 (1959). Accordingly, ¶2923.13 runs afoul of doctrine enunciated in a series of important decisions from *NAACP* v. *Button, supra,* through *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967); and *Zwickler* v. *Koota,* 389 U. S. 241 (1968), that statutes overbroad in the area of free speech are unconstitutional on their face because they create a "chilling effect upon the exercise of First Amendment rights." *Dombrowski* v. *Pfister, supra,* 380 U. S. at 487; see *NAACP* v. *Button, supra,* 371 U. S. at 432-433.

III.

Paragraph 2923.13 is unconstitutional as applied, because it punishes speech protected by the First and Fourteenth Amendments.

There is no question but that Ohio can prohibit such activities as sabotage, violence, crime, and unlawful methods of terrorism. But before Ohio may punish speech and assembly, which are protected by the Constitution, there must be a clear and present danger that the prohibited activities will bring about a punishable substantive evil. *Schenck* v. *United States,* 249 U. S. 47 (1919); *Abrams* v. *U. S.,* 250 U. S. 616 (1919); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Wood* v. *Georgia,* 370 U. S. 375 (1962).

In *Gitlow* v. *New York,* 268 U. S. 652 (1925), this Court affirmed, over the dissents of Justices Holmes and Brandeis, a conviction under the New York Criminal Anarchy statute. In so doing it applied a First Amendment test that permitted criminal conviction for speech alone that merely had a "tendency" to cause a substantive evil that the state had a right to prevent. A similar statute was upheld in *Whitney* v. *California,* 274 U. S. 357 (1927).

Though the decisions in *Gitlow* and *Whitney* have never been expressly overruled, the plurality opinion of Chief Justice Vinson in *Dennis* v. *United States,* 341 U. S. 494, 507 (1951) said: "Although no case subsequent to Whitney and Gitlow have expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined towards the Holmes-Brandeis rationale." The Chief Justice then quoted the restatement of that rationale in *American Communications Association* v. *Douds,* 338 U. S. 382, 412 (1950): "[The First] Amendment

requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantive evil will result therefrom."

The tests enunciated in the *Dennis* and *Douds* cases were criticized at the time in dissenting opinions in those cases and in scholarly articles for approving an unduly restrictive interpretation of the First Amendment, at the cost of freedom of expression and association in the United States.[8] Later cases have veered from the philosophy of the opinions in *Dennis* and *Douds*, see, e.g., *United States* v. *Robel*, 389 U. S. 258 (1967); and it is therefore likely that current First Amendment standards are more hospitable to free speech than the cases decided in the 1920s.

Even under the earlier test, however, the conviction in this case must be reversed, because there is no incitement in this case or any indication that the statements for which appellant has been convicted would imminently lead to violence.

In *Whitney* v. *California, supra*, 274 U. S. at 376, Justice Brandeis summed up the reasons for requiring imminent danger before expression can be aborted when he said that "advocacy of [law] violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is

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[8] See *American Communications Association* v. *Douds*, 338 U. S. 382, 445 (1950) (Black, J., dissenting); *Dennis* v. *United States*, 341 U. S. 494, 579 (1951) (Black, J., dissenting); *Id.* at 581 (Douglas, J., dissenting); Nathanson, The Communist Trial and the Clear-and-Present Danger Test, 63 Harv. L. Rev. 1167 (1950); Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193 (1952). See also the references contained in T. Emerson, D. Haber, and N. Dorsen, 1 POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, 126-129, 140-143, 155-157 (3d ed. 1967).

nothing to indicate that the advocacy would be immediately acted on." See also *Dennis* v. *United States, supra,* 341 U. S. at 507, and *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 689 (1959), quoting this language with approval.

The point of Justice Brandeis's language is simple and basic. In the absence of a constitutional rule absolutely forbidding the abridgement of free speech, it is essential, if the profound values underlying an open society are to be preserved, to protect opinions that are not intimately connected with illegal conduct; or as Justice Holmes put it, "so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Abrams* v. *United States, supra,* 250 U. S. at 630 (dissenting opinion).

The absence of any imminent danger—or indeed of any danger at all—from the speech for which appellant was convicted is evident from an inspection of the record. The critical words were spoken at a meeting apparently staged for television, filmed upon the request of an anonymous caller (A. 8, 12), and with the consent and cooperation of the persons participating (A. 12). Two sequences were recorded. The first sequence, filmed outdoors on private property (A. 17, 18), depicted ten to twenty hooded figures, an undetermined number of whom appeared to be armed, gathered around a large wooden cross which was ignited during the film, an act of symbolic significance. During this sequence voices unidentified either in the film or elsewhere in the record offered a series of fragmentary and largely incoherent phrases and political slogans which in part were derogatory of Negroes and Jews (A. 17, 18). A call was made in this segment for a march on Congress and then on Florida and Mississippi (A. 18). In this call,

the only reference that could even possibly be considered an allusion to violence contained a *disclaimer* of revenge: "We're not a revengent (sic) organization, but if our president, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengence taken" (A. 18).

There was no indication that the "revengence" mentioned here in the context of a political discussion was not the usual political revenge normally pursued peacefully.[9] The State offered no evidence to contradict the disclaimer of violence or to indicate that the speaker intended his remarks to mean anything other than use of the political process. Still less is there any evidence that this "revengence" was to take place imminently or immediately, as the test approved by the Supreme Court in *Dennis* and *Douds* would require.

It is true of course that in *Dennis* Chief Justice Vinson said it was sufficient, in light of the nature of the conspiracy found to exist within the Communist Party, for the government to prove that violent overthrow would take place "as speedily as circumstances would permit." But in the paragraph following, this Court said:

> "The situation with which Justices Holmes and Brandeis were concerned in Gitlow was a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community . . . They were not confronted with any

[9] See deposition of James R. Venable, attorney and Imperial Wizard of the National Knights of the Ku Klux Klan Association of America, as to non-violent nature of the Klan. R. 157. For other testimony on the philosophy of the Klan and its organizational restrictions against violence. See R. 137, 1830-84.

situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis." 341 U. S. at 510.

What we have here is similar to what Justices Holmes and Brandeis were confronted with in *Gitlow*—"a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community." Certainly the Ohio Ku Klux Klan does not embody "an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after world crisis"—or anything even close to it.

To uphold the conviction here would be to turn away from the constitutional precepts enunciated by Justices Holmes and Brandeis and specifically approved in *Dennis* and other cases. There is no warrant for doing so on this record.

The facts show that throughout the talk given by a man in a red hood, later identified as appellant, there was no indication of any crowds having gathered or of there being any onlookers other than the participants in the meeting. Even if there had been, that would not have justified the arrest of appellant—the presence of "muttering and grumbling onlookers" was held an insufficient reason to brook peaceful exercise of First Amendment rights in *Cox* v. *Louisiana*, 379 U. S. 536, 543 (1965). Nor was there any indication of any disturbance or a call for violence such as the Court condemned in *Feiner* v. *New York*, 340 U. S. 316 (1950). Furthermore, the rally took place away from populated areas and on private property where there could be "no actual interference with traffic" and no threat of "disturbance of the community", *Edwards* v. *South Carolina*, 372 U. S. 229, 239 (1963).

The second segment of film took place indoors, showing six hooded figures, some armed, and an unarmed figure in a red hood. He made a similar statement to the one made outdoors, but omitting any reference on this occasion to "revengence". Here too the announcement was nothing more than a political statement.

The State offered in evidence only the two filmed sequences (A. 17-18, 24), certain objects appearing in the film (A. 51), identification testimony (A. 43, R. 107), and testimony as to the location of the meeting (A. 9). Other than the words spoken in the films, the State offered no evidence whatever as to the aims and intentions of the speaker, the group depicted in the film, or the Ku Klux Klan itself. There was no attempt made by the state to show the presence of a clear and present danger, or indeed of any danger whatsoever.

For these reasons it is plain that the Ohio courts applied ¶2923.13 to the appellant in violation of his rights of free expression protected by the First and Fourteenth Amendments.

This conclusion is buttressed by the trial judge's instructions to the jury, which specifically permitted a verdict of guilty without a finding of any imminent danger to the community or of violent conduct by any individual, in short without a finding of a "clear and present danger" of any kind. Inspection of the relevant portions of the charge, which are set out at A. 78-79, reveals that there was simply no allusion to the necessity of proving imminent danger as a result of appellant's remarks. Accordingly, the jury could—and no doubt did—find appellant guilty without reference to any possible unlawful activity on his

part. In light of this charge it is all the more clear that the conviction here involves a constitutionally impermissible application of ¶2923.13 and must be reversed.

IV.

Paragraph 2923.13, which indiscriminately prohibits criminal syndicalism directed against the United States and the State of Ohio, is preempted by federal legislation.[10]

Pennsylvania v. *Nelson,* 350 U. S. 497 (1956), established that the Smith Act, 10 U. S. C. §2385, which was passed to protect the United States from subversion and sedition, excluded state legislation directed to the same goal. Subsequently, in *Uphaus* v. *Wyman,* 360 U. S. 72 (1959), the Court limited *Nelson* by ruling that a state investigative body could validly inquire into possible violations of the New Hampshire Subversive Activities Act, which was designed to protect the security of the state as distinguished from the federal government. See also *DeGregory* v. *New Hampshire Attorney General,* 383 U. S. 825, 827 n. 2 (1966).

Under these decisions the conviction in this case is invalid because ¶2923.13 is preempted by federal legislation, including the Smith Act, the more recently enacted Internal Security Act of 1950, 50 U. S. C. §781 *et seq.*, and the Communist Control Act of 1954, 50 U. S. C. §841. This is so

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[10] This issue, though not raised in the jurisdictional statement, may be considered by the Court, which has the power to notice a plain error not assigned. Rule 40(1)(d)(2); *Brotherhood of Carpenters* v *U. S.*, 330 U. S. 395, 412, and authorities there cited; *Silber* v. *United States,* 370 U. S. 717 (1962); cf. *Terminiello* v. *Chicago,* 337 U. S. 1, 7-12 (1949). The question was raised in the state trial and appellate courts.

because the Ohio statute is not limited in its terms to possible violence or overthrow of the state government, but is directed against such activities in relation to the United States government, and therefore provides no basis for concluding that it is confined to its only permissible objective—protection of the state against attempts to subvert it through violent means.

Nor does the indictment or the instructions to the jury cure the deficiency. The indictment, in two counts, assiduously follows the language of the statute. It is true that each count ends with the language "contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio." But this is *merely a formal* expression of the fact that Ohio is the sovereign bringing the charge, and such a formality is obviously insufficient to narrow the substantive scope of the indictment.

The relevant instructions to the jury are equally unavailing to the state. They were merely that "Political reform . . . refers to remodeling or changing the policy or administration of government" (A. 78). At no point is the jury advised of the critical distinction between "political reform" of the federal government and such reform of state and local governments.

The only action mentioned, a march on Congress and then Florida and Mississippi (A. 18) would take place far from Ohio. It is therefore impossible to tell whether the jury was concerned only with the danger posed by appellant's speech and voluntary assembly in Ohio or whether they took their task, in the absence of limiting instructions, to be that of surveying the danger posed to all organized forms of government.

Certainly the state should carry the burden of clarifying its legislation so to make certain that the strong policies underlying the *Nelson* decision are not infringed. These policies, it will be recalled, included the undesirability of state intrusion in a field where the federal concern is dominant—protection of the United States government against violent overthrow—and avoidance of the serious risk of conflict between state enforcement and the administration of the federal program.

The dangers foreseen in *Nelson* are evident here. All relevant federal legislation is still applicable, and with it the predominant federal interest in protecting the United States against the prohibited activity. Furthermore, because appellant is presumably subject to indictment for the very acts which are the subject of this prosecution, multiple punishments for the same acts are possible. Yet this is flatly inconsistent with the *Nelson* rationale. There it was said: "Without compelling indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment." 350 U. S. at 509-510.

Finally, it is important to note that in all these respects the prosecution here differs from the investigation upheld in *Uphaus* v. *Wyman, supra.* In that case the inquiry was directed to the security of New Hampshire, which this Court was not prepared to hold beyond the reach of the state government. No double prosecution was possible; indeed, because the matter was still at the investigative stage, there was real doubt as to whether there would ever be a single prosecution for the prohibited acts.

Accordingly, whatever the vitality or persuasiveness of the *Uphaus* distinction of the *Nelson* case, the very difference relied on there works in favor of the appellant here,

who is being criminally proceeded against under a state statute which reaches broadly into areas that are the exclusive domain of the federal government. For this reason ¶2923.13 is preempted by federal law, and prosecutions under it are invalid.[11]

V.

Appellant was denied the due process of law in that his conviction was supported by no evidence whatever.

In the absence of any evidence whatever to support a conviction, a person who is nevertheless found guilty and convicted is denied due process of law. *Thompson* v. *Louisville,* 362 U. S. 199 (1960); *Garner* v. *Louisiana,* 368 U. S. 157 (1961); *Barr* v. *City of Columbia,* 378 U. S. 146 (1964); *Johnson* v. *Florida,* 391 U. S. 596 (1968).

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[11] The applicability of the *Nelson* case to this prosecution should be viewed, moreover, in the light of current realities. In the context of the present political situation, it is inconceivable that advocacy of overthrow of government by force and violence could be limited to state and local governments. In an earlier day this might have been the case, see *Luther* v. *Borden,* 7 How. (48 U. S.) 1 (1849). But today, revolutionary movements seek overthrow of all existing government. As such, all sedition is, in effect, a "crime against the *Nation.*" *Pennsylvania* v. *Nelson, supra,* 350 U. S. at 505, quoting with approval the Court below (emphasis in original).

State and local governments would be incidental targets of any who wished to take over the country. The overthrow of state government is a necessary by-product of the overthrow of the federal government. But if the states can continue to prohibit such activity and prosecute those who criminally advocate it, a danger of the same kind and one equal in magnitude to that noted in the *Nelson* case would arise. A state could prosecute acts prohibited by the Smith Act simply by skillfully drafting its indictments. In short, if every act made criminal under federal legislation is also a crime against each state, the rule of preemption would be reduced to a mere matter of pleading and a race to the courthouse door.

Under the terms of ¶2123.13 and the indictments in this case, Ohio had the burden of showing advocacy, assembly, and organization to propagate criminal syndicalism.[12] It is plain that the state altogether failed in meeting its burden, and appellant's conviction is therefore invalid.

The state chose to rest on the film and supplemental identification testimony. Yet neither the film nor transcript contain a scintilla of evidence of advocacy of reform through violence that would have satisfied count one. The evidence, as we have shown, is to the contrary. Nor did the state attempt to satisfy that part of ¶2923.13 prohibiting voluntary assemblage with such a group, for it offered no proof of the purpose of the group assembled or of the Klan, as required to meet count two.

In *Fiske* v. *Kansas*, 274 U. S. 380 (1927), this Court invalidated a conviction under the Kansas Criminal Syndicalism Act containing language paralleling the Ohio statute at issue here. At trial, the only evidence offered of criminal syndicalism was the preamble of the organization's constitution advocating, *inter alia* that " 'between [the working class and the employing class] a struggle must go on until the workers of the world organize as a class, take possession of the earth, and the machinery of production and abolish the wage system' " 274 U. S. at 382-383. Moreover, in *DeJonge* v. *Oregon*, 299 U. S. 353 (1937), this Court said unanimously:

> "[C]onsistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime.

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[12] The trial court gratuitously offered a charge on conspiracy in the absence of conspiracy language from the statute, the indictment, or as part of the state's proof. A. 79-80.

> The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." 299 U. S. at 365.

In *DeJonge* the Court also stated that it was no crime for a speaker to urge attendance at a "meeting of the [Communist] party . . . and to bring their friends to show their defiance of local police authority and to assist them in their revolutionary tactics." 299 U. S. at 359. Can it therefore be illegal today to announce a peaceful march on Congress and on two Southern states, or even to suggest that some unnamed revenge may follow if the government doesn't change, or to express dislike for certain minority groups in a derogatory manner? Whatever the generally held view of the Klan, the state is held to its proof, especially where the crime charged consists of words and alleged association. The prosecution failed altogether to meet the most minimal evidential standards.

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,

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